at&t

**Paul G. Lane**
*General Counsel-Missouri and Kansas*

AT&T Missouri
One AT&T Center
Room 3520
St. Louis, MO 63101

T: 314-235-4300
F: 314-247-0014
paul.lane@att.com

To: Commissioner Robert M. Clayton III
Commissioner Steve Gaw

From: Paul G. Lane

Date: 7/11/2006

No. of pages: 12

Subject: Subpoena *Duces Tecum* and Subpoena *Ad Testificandum*

The response of the AT&T affiliated entities to the various subpoenas is attached. It is being provided in advance of the due date in order to permit you to cancel the attendance of the court reporter and reschedule your day.

Please provide a copy of the attached documents to each Commissioner.

cc: Commissioner Linward Appling
Commissioner Jeff Davis
Commissioner Connie Murray

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EXHIBIT
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at&t

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**VIA FACSIMILE AND U.S. MAIL**

July 11, 2006

Commissioner Robert M. Clayton III
Commissioner Steve Gaw
Missouri Public Service Commission
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, MO 65102

Re: **Subpoena *Duces Tecum***

Dear Commissioners:

**THE AT&T AFFILIATED ENTITIES' RESPONSE TO SUBPOENA *DUCES TECUM***

The AT&T affiliated entities,[1] through undersigned counsel, hereby respond to the Subpoena *Duces Tecum* issued by Commissioners Robert M. Clayton III and Steve Gaw of the Missouri Public Service Commission, dated June 16, 2006.[2] The AT&T affiliated entities reserve the right to supplement and amend these responses as circumstances may warrant.

**THE AT&T AFFILIATED ENTITIES' RESPONSES AND OBJECTIONS TO DOCUMENT REQUESTS**

## A. GENERAL OBJECTIONS

The General Objections set forth herein apply to each of the document requests propounded by the Commissioners to the extent that they call for information relating to any classified National Security Agency ("NSA") program and shall have the same force and effect as if set forth in full in response to each document request.

1. The AT&T affiliated entities object to the Subpoenas on the ground that the investigative subject matter of the Subpoenas is wholly preempted by federal law, because, *inter alia*:

---

[1] The AT&T affiliated entities responding to this subpoena are: SBC Advanced Solutions, Inc., d/b/a AT&T Advanced Solutions; TCG Kansas City, Inc.; TCG St. Louis Holdings, Inc., d/b/a TCG St. Louis; SBC Long Distance, LLC; Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri; and AT&T Communications of the Southwest, Inc.
[2] The AT&T affiliated entities provide this response without waiving any objections to the service of the subpoenas.

a. The State of Missouri lacks authority or jurisdiction to investigate or otherwise examine any alleged cooperation of telecommunications carriers with intelligence or national security activities conducted by the federal government. Foreign intelligence, foreign affairs, military, and national security matters are exclusively the province of the federal government, and any state law, regulation, or state governmental activity that would have a tendency to conflict, impair, impede, defeat, or affect such federal activities is wholly preempted under the Supremacy Clause of the United States Constitution. *See* U.S. Const., art. VI, sec. 2; *id.*, art. I, sec. 8; *id.*, art. II, sec. 2; *Boyle v. United Technologies*, 487 U.S. 500 (1988); *Zschernig v. Miller*, 389 U.S. 429 (1968); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *United States v. Pink*, 315 U.S. 203 (1942); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

b. Congress has legislated extensively concerning the obligations of telecommunications carriers to assist federal law enforcement and intelligence agencies and has thereby occupied the field of regulation and legislation in this area. *See, e.g.*, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.* (Title 18, chs. 119 and 121); the Communications Assistance to Law Enforcement Act, 47 U.S.C. § 1001, *et seq.*; the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*; *United States v. Carrazana*, 921 F.2d 1557 (11th Cir. 1991).

c. The constitutionally-based, federal common law "*Totten* rule" prohibits the review in any adjudicatory or quasi-adjudicatory setting of claims premised on the existence of secret espionage relationships between the United States and private parties. *See, e.g., Tenet v. Doe*, 544 U.S. 1, 9, (2005) (holding that "lawsuits premised on alleged espionage agreements are altogether forbidden.").

d. The United States has invoked the state secrets privilege with respect to the entire subject matter of the Subpoena in related litigation against AT&T entities in the United States District Court for the Northern District of California. *See Hepting v. ATT*, Case No. C-06-0672 (VRW) (N.D. CA 2002); *Terkel, et al. v. AT&T Inc., et al.*, No. 06 cv 2837. The United States' assertion of the privilege in that case covers "the existence, scope, and potential targets of alleged [NSA] intelligence activities, as well as AT&T's alleged involvement in such activities." Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, at 16 (filed Apr. 28, 2006). The privilege belongs to the federal government, and a private party such as AT&T Corp. has no authority to waive that privilege by, for example, disclosing materials, to the extent such materials may exist, covered by it. *See, e.g., United States v. Reynolds*, 345 U.S. 1, 7 (1953).

e. Specific provisions of federal law prohibit the disclosure of the categories of information sought by the Subpoena. Without confirming or denying the existence of any such information, the AT&T affiliated entities note that it is a federal felony for any person to divulge classified information "concerning the communication intelligence activities of the United States" to any person not authorized to receive such information. 18 U.S.C. § 798. There are also independent statutory prohibitions on divulging information or records pertaining to surveillance activities undertaken pursuant to FISA or ECPA, as well as the activities of the NSA. *See* 50 U.S.C. §§ 1805(c)(2)(B), (C); 18 U.S.C. § 2511(2)(a)(ii)(B); 50 U.S.C. § 402 note; *Founding Church of Scientology v. NSA*, 610 F.2d 824, 828 (D.C. Cir. 1979) (50 U.S.C. § 402 note reflects congressional judgment that information pertaining to activities of NSA "ought to be safe from forced exposure").

2. The AT&T affiliated entities further object to the Subpoenas based upon the attached letter the AT&T affiliated entities have received from the Office of the Director of National Intelligence in which the United States advises them that responding to the subpoenas would "violate various specific provisions of federal statutes and Executives Order" and "would be inconsistent with, and preempted by, federal law." *See* Letter from Benjamin A. Powell, General Counsel, Office of the Director of National Intelligence to Edward R. McNicholas, attorney for the AT&T affiliated entities, dated July 11, 2006. Specifically, "[c]ompliance with the subpoenas by [the AT&T affiliated entities] would place them in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without harming national security." *Id.* As the letter notes, this position has also been asserted by the United States in a similar case where New Jersey state officials subpoenaed AT&T Corp. and other telecommunications carriers for documents relating to customer proprietary data and phone records allegedly turned over to the NSA. On June 14, 2006, the United States filed suit in the United States District Court for the District of New Jersey against New Jersey state officials and telecommunications carriers seeking a declaration that "the Subpoenas issued by the State Defendants may not be enforced by the State Defendants or responded to by the Carrier Defendants." *See United States v. Farber*, Prayer for Relief ¶ 1, Civil Action No. 06-cv-2683(SRC)(TJB) (D.N.J.). In a separate letter accompanying its complaint, the United States also advised AT&T Corp. that "[r]esponding to the subpoenas - including by disclosing whether or to what extent any responsive materials exist - would violate federal laws and Executive Orders." *See* Letter from Peter Keisler to Bradford A. Berenson, et al. (June 14, 2006). Accordingly, the AT&T affiliated entities are obliged to respect this official admonition, made by the United States Department of Justice, until such time as there has been a final determination of the legal claims of the United States by the federal courts.

3. The AT&T affiliated entities further object to the Subpoenas on the ground that any resulting enforcement action by Missouri would be premised on allegations falling within the scope of the immunities granted to telecommunications carriers under 18 U.S.C. §§ 2511(2)(a)(ii), 2703(e), & 3124(d); 50 U.S.C. § 1805(i), and other statutes and authorities privileging carriers to cooperate with authorized governmental intelligence, law enforcement, or national security activities.

4. The AT&T affiliated entities further object to the Subpoenas on the ground that the Missouri Public Service Commission lacks jurisdiction to inquire into matters of national security or requests of Federal agencies for information.

5. Based upon the extensive correspondence which preceded this request, the AT&T affiliated entities understand the subpoenas duces tecum to be addressed to the alleged provision of information in connection with NSA activities. To the extent the subpoenas are intended to address any other matters, the AT&T affiliated entities object on the basis that each request is vague, overbroad, irrelevant, unduly burdensome, and not limited in time or scope.

**B. DOCUMENT REQUESTS**

1. Any order, subpoena or directive of any court, tribunal or administrative agency or officer whatsoever, directing or demanding the release of customer proprietary information relating to Missouri customers of [the AT&T affiliated entities].

**RESPONSE:** In addition to the foregoing General Objections, incorporated herein, the AT&T affiliated entities state that they regularly cooperate with federal and state agencies and courts with regard to the provision of information in connection with law enforcement activities. The AT&T affiliated entities further state that in all instances in which they provide any information they do so in strict accordance with the law. As the Commission is aware and as set forth in the AT&T affiliated entities' General Objections, in some instances, the AT&T affiliated entities are prohibited by federal law from disclosing any information which even confirms the existence or non-existence of any such cooperation.

2. A copy of any confidentiality agreement or agreements related to the release of customer proprietary information relating to Missouri customers of [the AT&T affiliated entities].

**RESPONSE:** In addition to the foregoing General Objections, incorporated herein, the AT&T affiliated entities state that they regularly cooperate with federal and state agencies and courts with regard to the provision of information in connection with law enforcement activities. The AT&T affiliated entities further state that in all instances in which they provide any information they do so in strict accordance with the law. As the Commission is aware and as set forth in the AT&T affiliated entities' General Objections, in some instances the AT&T affiliated entities are prohibited by federal law from disclosing any information which even confirms the existence or non-existence of any such cooperation.

3. Any other documents, materials or information pertinent to items 1 or 2, above.

**RESPONSE:** In addition to the foregoing General Objections, incorporated herein, the AT&T affiliated entities state they regularly cooperate with federal and state agencies and courts with regard to the provision of information in connection with law enforcement activities. The AT&T affiliated entities further state that in all instances in which they provide any information they do so in strict accordance with the law. As the Commission is aware and as set forth in the AT&T affiliated entities' General Objections, in some instances the AT&T affiliated entities are prohibited by federal law from disclosing any information which even confirms the existence or non-existence of any such cooperation.

4. Copies of all records maintained pursuant to PSC Rule 4 CSR 240-33.160(6) involving the disclosure of CPNI to a third party.

**RESPONSE:** In addition to the foregoing General Objections, incorporated herein, the AT&T affiliated entities state that they regularly cooperate with federal and state agencies and courts with regard to the provision of information in connection with law enforcement activities. The AT&T affiliated entities further state that in all instances in which they provide any information they do so in strict accordance with the law. As the Commission is aware and as set forth in the AT&T affiliated entities' General Objections, in some instances the AT&T affiliated entities are prohibited by federal law from disclosing any information which even confirms the existence or non-existence of any such cooperation.

Please address any future communications concerning this matter to my attention.

Very truly yours,

Paul G. Lane

Paul G. Lane
Attorney for AT&T Affiliated Entities

cc: Commissioner Linward Appling
Commissioner Jeff Davis
Commissioner Connie Murray

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at&t

**Paul G. Lane**
*General Counsel-Missouri and Kansas*

AT&T Missouri
One AT&T Center
Room 3520
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T: 314-235-4300
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**VIA FACSIMILE AND U.S. MAIL**

July 11, 2006

Commissioner Robert M. Clayton III
Commissioner Steve Gaw
Missouri Public Service Commission
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, MO 65102

Re: **Subpoena *Ad Testificandum***

Dear Commissioners:

**THE AT&T AFFILIATED ENTITIES' RESPONSE TOSUBPOENA *AD TESTIFICANDUM***

The AT&T affiliated entities,[1] through undersigned counsel, hereby respond to the Subpoenas *Ad Testificandum* of Commissioners Robert M. Clayton III and Steve Gaw of the Missouri Public Service Commission dated June 16, 2006.[2] The AT&T affiliated entities reserve the right to supplement and amend these responses as circumstances may warrant.

**THE AT&T AFFILIATED ENTITIES' RESPONSES AND OBJECTIONS TO THE SUBPOENAS AD TESTIFICANDUM**

## A. GENERAL OBJECTIONS

The General Objections set forth herein apply to each of the topics specified in Attachment A and shall have the same force and effect as if set forth in full in response to each document request.

1. The AT&T affiliated entities object to the Subpoenas on the ground that the investigative subject matter of the Subpoenas is wholly preempted by federal law, because, *inter alia*:

---

[1] The AT&T affiliated entities responding to this subpoena are: SBC Advanced Solutions, Inc., d/b/a AT&T Advanced Solutions; Southwestern Bell Telephone, L.P, d/b/a AT&T Missouri.; SBC Long Distance, LLC.; TCG St. Louis Holdings, Inc.; TCG Kansas City, Inc.; and AT&T Communications of the Southwest, Inc
[2] The AT&T affiliated entities provide this response without waiving any objections to the service of the subpoenas.

a. The State of Missouri lacks authority or jurisdiction to investigate or otherwise examine any alleged cooperation of telecommunications carriers with intelligence or national security activities conducted by the federal government. Foreign intelligence, foreign affairs, military, and national security matters are exclusively the province of the federal government, and any state law, regulation, or state governmental activity that would have a tendency to conflict, impair, impede, defeat, or affect such federal activities is wholly preempted under the Supremacy Clause of the United States Constitution. *See* U.S. Const., art. VI, sec. 2; *id.*, art. I, sec. 8; *id.*, art. II, sec. 2; *Boyle v. United Technologies*, 487 U.S. 500 (1988); *Zschernig v. Miller*, 389 U.S. 429 (1968); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *United States v. Pink*, 315 U.S. 203 (1942); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

b. Congress has legislated extensively concerning the obligations of telecommunications carriers to assist federal law enforcement and intelligence agencies and has thereby occupied the field of regulation and legislation in this area. *See, e.g.*, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.* (Title 18, chs. 119 and 121); the Communications Assistance to Law Enforcement Act, 47 U.S.C. § 1001, *et seq.*; the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*; *United States v. Carrazana*, 921 F.2d 1557 (11th Cir. 1991).

c. The constitutionally-based, federal common law "*Totten* rule" prohibits the review in any adjudicatory or quasi-adjudicatory setting of claims premised on the existence of secret espionage relationships between the United States and private parties. *See, e.g., Tenet v. Doe*, 544 U.S. 1, 9, (2005) (holding that "lawsuits premised on alleged espionage agreements are altogether forbidden.").

d. The United States has invoked the state secrets privilege with respect to the entire subject matter of the Subpoena in related litigation against AT&T entities in the United States District Court for the Northern District of California. *See Hepting v. ATT*, Case No. C-06-0672 (VRW) (N.D. CA 2002); *Terkel, et al. v. AT&T Inc., et al.*, No. 06 cv 2837. The United States' assertion of the privilege in that case covers "the existence, scope, and potential targets of alleged [NSA] intelligence activities, as well as AT&T's alleged involvement in such activities." Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, at 16 (filed Apr. 28, 2006). The privilege belongs to the federal government, and a private party such as AT&T Corp. has no authority to waive that privilege by, for example, disclosing materials, to the extent such materials may exist, covered by it. *See, e.g., United States v. Reynolds*, 345 U.S. 1, 7 (1953).

e. Specific provisions of federal law prohibit the disclosure of the categories of information sought by the Subpoena. Without confirming or denying the existence of any such information, the AT&T affiliated entities note that it is a federal felony for any person to divulge classified information "concerning the communication intelligence activities of the United States" to any person not authorized to receive such information. 18 U.S.C. § 798. There are also independent statutory prohibitions on divulging information or records pertaining to surveillance activities undertaken pursuant to FISA or ECPA, as well as the activities of the NSA. *See* 50 U.S.C. §§ 1805(c)(2)(B), (C); 18 U.S.C. § 2511(2)(a)(ii)(B); 50 U.S.C. § 402 note; *Founding Church of Scientology v. NSA*, 610 F.2d 824, 828 (D.C. Cir. 1979) (50 U.S.C. § 402 note reflects congressional judgment that information pertaining to activities of NSA "ought to be safe from forced exposure").

2. The AT&T affiliated entities further object to the Subpoenas based upon the attached letter the AT&T affiliated entities have received from the Office of the Director of National Intelligence in which the United States advises them that responding to the subpoenas would "violate various specific provisions of federal statutes and Executives Order" and "would be inconsistent with, and preempted by, federal law." *See* Letter from Benjamin A. Powell, General Counsel, Office of the Director of National Intelligence to Edward R. McNicholas, attorney for the AT&T affiliated entities, dated July 11, 2006. Specifically, "[c]ompliance with the subpoenas by [the AT&T affiliated entities] would place them in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without harming national security." *Id.* As the letter notes, this position has also been asserted by the United States in a similar case where New Jersey state officials subpoenaed AT&T Corp. and other telecommunications carriers for documents relating to customer proprietary data and phone records allegedly turned over to the NSA. On June 14, 2006, the United States filed suit in the United States District Court for the District of New Jersey against New Jersey state officials and telecommunications carriers seeking a declaration that "the Subpoenas issued by the State Defendants may not be enforced by the State Defendants or responded to by the Carrier Defendants." *See United States v. Farber*, Prayer for Relief ¶ 1, Civil Action No. 06-cv-2683(SRC)(TJB) (D.N.J.). In a separate letter accompanying its complaint, the United States also advised AT&T Corp. that "[r]esponding to the subpoenas - including by disclosing whether or to what extent any responsive materials exist - would violate federal laws and Executive Orders." *See* Letter from Peter Keisler to Bradford A. Berenson, et al. (June 14, 2006). Accordingly, the AT&T affiliated entities are obliged to respect this official admonition, made by the United States Department of Justice, until such time as there has been a final determination of the legal claims of the United States by the federal courts.

3. The AT&T affiliated entities further object to the Subpoenas on the ground that any resulting enforcement action by Missouri would be premised on allegations falling within the scope of the immunities granted to telecommunications carriers under 18 U.S.C. §§ 2511(2)(a)(ii), 2703(e), & 3124(d); 50 U.S.C. § 1805(i), and other statutes and authorities privileging carriers to cooperate with authorized governmental intelligence, law enforcement, or national security activities.

4. The AT&T affiliated entities further object to the Subpoenas on the ground that the Missouri Public Service Commission lacks jurisdiction to inquire into matters of national security or requests of Federal agencies for information.

## B. REQUESTS FOR TESTIMONY

1. The number of Missouri customers, if any, whose calling records have been delivered or otherwise disclosed to the National Security Agency ("NSA") and whether or not any of those customers were notified that their records would be or had been so disclosed and whether or not any of those customers consented to the disclosure.

**RESPONSE:** Based on the foregoing General Objections, incorporated herein, the AT&T affiliated entities state that they are unable to provide any testimony on this topic.

2. The legal authority, if any, under which the disclosures referred to in Paragraph 1, above, were made.

**RESPONSE:** Based on the foregoing General Objections, incorporated herein, the AT&T affiliated entities state that they are unable to provide any testimony on this topic.

3. The nature or type of information disclosed to the NSA, including telephone number, subscriber name and address, social security numbers, calling patterns, calling history, billing information, credit card information, internet data, and the like.

**RESPONSE:** Based on the foregoing General Objections, incorporated herein, the AT&T affiliated entities state that they are unable to provide any testimony on this topic.

4. The date or dates on which the disclosures referred to in Paragraph 1, above, were made.

**RESPONSE:** Based on the foregoing General Objections, incorporated herein, the AT&T affiliated entities state that they are unable to provide any testimony on this topic.

5. The particular exchanges for which any number was disclosed to the NSA.

**RESPONSE:** Based on the foregoing General Objections, incorporated herein, the AT&T affiliated entities state that they are unable to provide any testimony on this topic.

Please address any future communications concerning this matter to my attention.

Very truly yours,

Paul G. Lane
Attorney for AT&T Affiliated Entities

Attachment

cc: Commissioner Linward Appling
Commissioner Jeff Davis
Commissioner Connie Murray